IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 886 OF 2005.

M/s.Noble Asset Company Limited. ... Petitioner.

V/s.

1. Union of India,

2. K.P.Mishra,
Commissioner of Customs,
(Preventive)

3. Hongkong & Shanghai
Banking Corporation Limited. ... Respondents.

E.P.Bharucha with Bomi Patel i/b.
Mulla & Mulla & Graigie Blunt & Caroe
for the petitioner.

M.I.Sethna, Senior Counsel with A.M.Sethna
for respondent Nos.1 and 2.

Chirag Balsara with Raju Gawde i/b.
K.Ashraf & Co. for respondent No.3.

CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.

DATED : 6th April, 2005.

P.C. :

. Rule, returnable forthwith. Taken up for hearing by consent of parties.

. This petition filed under Article 226 of the Constitution of India is directed against the order passed by the Commissioner of Customs (Preventive), respondent No.2 herein ('impugned order' for short) whereby the seized rig, which was provisionally released in favour of the petitioner is ordered to be

confiscated under section 125 (2) of the Customs Act, 1962 ("Act" for short) with further direction to forthwith encash the bank guarantee of Rs.15 crore of HSBC Bank given by M/s Noble Asset Co. Ltd. to secure the amount of fine. In addition to this, a demand for duty of Rs.7,89,53,162/- also came to be confirmed against the petitioner. The petitioner also prayed for direction against the respondent No.2 not to encash the bank guarantee pending disposal of stay application to be filed by the petitioner before the Central Excise and Service Tax Tribunal (the 'Tribunal' for short).

2. During the course of hearing,learned Counsel appearing for the petitioner submitted that though the petitioner claims wider relief but petitioner desires to restrict it to a relief in the nature of direction against respondent No.2 not to encash bank guarantee dated 17th May 2001 pending filing of appeal with application for stay which petitioner intends to file before the Tribunal against the substantive order dated 23rd March 2005.

3. The parties were heard on the restricted relief claimed by the petitioner referred to hereinabove.

4. Mr.Bharucha, learned senior counsel for the petitioner submitted that respondent No.2 could not have passed the impugned order directing the respondents to encash bank guarantee of Rs.15 crore with immediate effect, especially, when the impugned order is subject to appeal before the appellate authority as is clear from the preamble of the impugned order itself. He further submits that the petitioner has statutory right of appeal with right to move an application to get the pre-deposit waived in terms of section 129E of the Act. According to Mr.Bharucha, the bank guarantee can only be encashed subject to assessment becoming final and such finality can only be upon final decision of the appeal. He further submits that as per the policy of the respondents engrafted in the Circular No.396/29/98-CX, dated 2nd June 1998 the respondents are expected not to resort to coercive action so long as the appeal period is not over as such the directions issued in the impugned order directing encashment of bank guarantee with immediate effect is bad and illegal.

5. The learned counsel for the petitioner placed reliance on the judgment in the case of **Mahindra & Mahindra Ltd. v. Union of India**, 1992 (59) E.L.T. 505 (Bom.); wherein this Court had ruled

that it was highly improper on the part of the Collector and Assistant Collector to encash the bank guarantees before expiry of the statutory period of three months available for filing appeal. The Division Bench of this Court in this case had to direct the respondent Nos.2 and 3 to return the entire amount recovered by them through encashment of bank guarantees to the petitioners within 10 days from the date of the order.

6. On the similar lines, the view taken by the Delhi High Court in the case of N.G.Enterprises v. Commissioner of Customs (Appeals), New Delhi, 2002 (144) E.L.T. 503 (Del.), was also brought to our notice wherein the High Court of Delhi did not permit coercive recovery till appeal period was over.

7. Mr.Bharucha, relying on the above judgments, urged that applying the same ratio laid down in the above judgment the respondents be refrained from encashing the bank guarantee, till the application for stay is considered by the Appellate Authority on its own merits.

8. Per contra, Mr.M.I.Sethna, learned senior counsel appearing for the Revenue without filing any

counter affidavit contends that the bank guarantee of the foreign bank was furnished by the petitioner. They do not have their office in India and that the goods namely, the rig, which are provisionally released has been removed outside the country as such not available for confiscation. He submits that the respondents are not obliged to wait till the expiry of appeal period . According to him, once the assessment order is passed by the adjudicating authority it is open for the Revenue to invoke bank guarantee. In the submission of Mr. Sethna petition deserves to be dismissed in limine and the petitioner must be directed to seek relief in the appeal to be filed by them.

Consideration :

9. Having heard rival parties it is not in dispute that the impugned order is an appellable order and the appeal period is yet to expire. It is also not in dispute that the policy of the respondents is not to resort to coercive recovery during the period available for filing appeal.

10. The forcefully canvassed submission of Mr.Sethna that the bank guarantee is of a foreign bank and that it ought to have been of a nationalised bank,

prima facie; does not hold water looking to the conduct of the Revenue, who has not only accepted the said bank guarantee of a foreign bank but has also acted upon the same by provisionally releasing the rigs.

11. The bank guarantee was furnished somewhere in the month of May 2001. Till this date i.e. till 2005, at no point of time any objection was raised to the quality or to the validity of the bank guarantee by the Revenue. Thus, submission made in this behalf is misplaced.

12. So far as the removal of rigs outside India is concerned, it was well within the knowledge of the Revenue. At no point of time in past four years complaint was made by the Revenue in this behalf. In this view of the matter, the submission made by Mr.Sethna in this behalf is devoid of any substance.

13. The petitioner has statutory right of appeal. The appeal period is yet to expire. Declared policy of the respondents is not to resort to coercive recovery during the appeal period. If the department has accepted the bank guarantee and acted upon it almost four years, one fails to understand what

prejudice would cause to the Revenue if the bank guarantee is not allowed to be encashed for further period of four weeks i.e. during the period in which the petitioner is willing to file appeal along with stay application before the Appellate Authority. The action of respondents, in our view, to proceed to encash bank guarantee with undue haste is contrary to their own declared policy. The petitioner has made out a case for limited relief granted herein. The balance of convenience is in favour of the petitioner. Petitioner shall suffer greater injury compared to the respondents if the limited relief in favour of the petitioner is refused. On the contrary, postponement of encashment of bank guarantee by another four weeks and making it subject to the order of the appellate authority shall not cause any prejudice or irreparable loss to the respondents.

14. We had an occasion to consider the similar situation in the case of **Ocean Driving Center Ltd. v. Union of India**, 2005 (180) E.L.T. 313 (Bom.); wherein the Revenue was restrained from encashing bank guarantee during appeal period. The Division Bench of this Court consisting of Justice Kurdukar and Justice Kapadia had also occasion to consider the similar question in the case of **Mahindra & Mahindra** (cited

Supra); wherein the encashment of bank guarantee during the appeal period was set aside and the Revenue was made to refund the proceeds of the bank guarantee.

15. In this view of the matter, in our considered view, the petitioner is entitled to have limited direction against the respondent No.2 not to encash bank guarantee until the appeal along with application for stay or to dispense with pre-deposit is moved by the petitioner before the Tribunal. The petitioner undertakes to move the appellate authority i.e. Tribunal within four weeks from today. Statement made in this behalf is taken on record. We have no doubt that in the event of an appeal with necessary stay application is filed within four weeks from today, the Appellate Authority shall definitely consider the application for stay and/or waiver of pre-deposit within two weeks thereafter. Accordingly, we direct the respondents not to encash the bank guarantee for six weeks from today. Needless to mention that the petitioner shall keep the bank guarantee alive till the application for stay and/or waiver of pre-deposit is not heard and decided on its own merits. We make it clear that in the event of failure on the part of the petitioner to file appeal along with necessary application within four weeks as stated above the respondents shall be entitled to encash the bank guarantee

15. We further make it clear that we have neither examined the merits of the matter nor considered the challenges to the impugned order. WE have only examined the issue as to whether Revenue is justified in encashing bank guarantee during the period available for filing appeal. The observations made by us are prima facie. the Tribunal shall be free to decide stay application or prayer for waiver of pre-deposit on its own merits in accordance with law, uninfluenced by this order which automatically shall come to an end with the decision of the stay application by the appellate forum, namely the Tribunal.

16. In the result, petition is allowed. Rule is made absolute in terms of this order with no order as to costs.

17. At this stage, learned counsel for respondent Nos.1 and 2 prayed for stay of this order. Since we have merely relied upon the earlier view of this Court, referred to in para-14 (supra), which has been accepted by the Revenue, we do not see any reason to stay this order. Prayer for stay of this order is, thus, rejected.

(J.P.Devadhar, J.) **(V.C.Daga, J.)**